

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Inquiry Concerning High-Speed Access to	)	GN Docket No. 00-185
the Internet Over Cable and Other Facilities	)	
	)	
Internet Over Cable Declaratory Ruling	)	
	)	
Appropriate Regulatory Treatment for	)	CS Docket No. 02-52
Broadband Access to the Internet Over	)	
Cable Facilities	)	
_____	)	

**COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTA),<sup>1</sup> through the undersigned and pursuant to Federal Communications Commission (FCC) Rules 1.415 and 1.419,<sup>2</sup> hereby submits its comments in the above-docketed proceeding. This rulemaking proceeding is linked to several other FCC rulemaking proceedings in which the FCC is examining the provision of broadband by incumbent local exchange carriers (ILECs) and how it is to be regulated, if at all, by the FCC.<sup>3</sup> Through this rulemaking proceeding<sup>4</sup> and its *Wireline Broadband Access* rulemaking

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<sup>1</sup> USTA is the Nation's oldest trade organization for the local exchange carrier industry. USTA represents over 670 carrier members that provide a full array of voice, data and video services over wireline and wireless networks. USTA members support the concept of universal service, and its carrier members are leaders in the provision of advanced telecommunications services to American and international markets.

<sup>2</sup> 47 C.F.R. §§ 1.415 and 1.419.

<sup>3</sup> See *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Companies Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket No. 02-33 and CC Docket Nos. 95-20, 98-10, FCC 02-42, Notice of Proposed Rulemaking (rel. Feb. 14, 2002) (*Wireline Broadband Access NPRM*); *Review of Regulatory Requirements for Incumbent LEC Broadband Services; SBC Petition for Expedited Ruling That it is Non-Dominant in its Provision of Advanced Services and for Forbearance From Dominant Carrier Regulation of These Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, FCC 01-360, 16 FCC Rcd 22745 (rel. Dec. 20, 2001) (*Incumbent LEC*

proceeding, the FCC is examining the appropriate legal and regulatory policy framework under the Communications Act of 1934, as amended, for broadband access to the Internet over wireline broadband facilities and cable broadband facilities.<sup>5</sup> USTA's interest in this proceeding is to ensure that regulatory rules and policies that are ultimately applied to cable broadband facilities used to provide access to the Internet are equally applied to wireline broadband facilities used to provide access to the Internet. As stated by W.J. "Billy" Tauzin, Chairman of the House of Representatives Committee on Energy and Commerce in a recent letter to FCC Chairman Michael Powell:

As the court [in *USTA v. FCC*<sup>6</sup>] pointed out, cable companies not only compete with ILECs for broadband customers - cable companies dominate the broadband market. Faced with this overwhelming amount of competition, ILECs should not be subjected to an additional regulatory burden that their stronger competitors do not face. This requirement [line sharing] not only reduces the ILECs' incentive to invest in new facilities, the burden also prevents ILECs from competing on an equal footing with cable companies and other broadband providers.<sup>7</sup>

Data collected by the FCC and non-FCC sources demonstrate the competitive nature of the broadband market, particularly the broadband mass market.<sup>8</sup> Disparate treatment of ILEC broadband is unjustified and places ILECs at a severe competitive disadvantage to their

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*Broadband NPRM*); and *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Notice of Proposed Rulemaking, FCC 01-361, 16 FCC Rcd 22781 (rel. Dec. 20, 2001) (*Triennial Review NRRM*).

<sup>4</sup> *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, *Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77 (rel. Mar. 15, 2002) (*Cable Modem Access NPRM*).

<sup>5</sup> *Id.* at ¶ 72.

<sup>6</sup> *United States Telecom Association v. FCC*, Nos. 00-1012, *et al.* (D.C. Cir. May 24, 2002).

<sup>7</sup> Letter from the Honorable W.J. "Billy" Tauzin, Chairman, U.S. House of Representatives Committee on Energy and Commerce, to the Honorable Michael Powell, Chairman, Federal Communications Commission, June 11, 2002, at p.3.

<sup>8</sup> *See In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Third Report, FCC 02-33 (rel. Feb. 6, 2002) (*Third Section 706 Report*). *See also* Exhibit A (*Broadband Fact Report*) to the Comments of Verizon, filed

broadband competitors, without a justifiable basis. USTA is encouraged that in proceedings commenced by the FCC in the last six months, the FCC demonstrated a willingness to address the issues of regulatory parity and inter-modal competition in broadband markets. By placing ILEC broadband Internet access service on an equal, deregulated footing with cable broadband Internet access service, the FCC will spur the deployment of broadband infrastructure, unleash vigorous head-to-head competition for broadband Internet access services, increase consumer choice, and stimulate the nation's economy.<sup>9</sup> Accordingly, USTA submits these comments in support of parity in the regulatory, or preferably deregulatory, treatment of competing broadband services, regardless of the platforms used to provide these services.<sup>10</sup>

## SUMMARY

USTA supports the general finding that broadband Internet access service is an interstate information service and the specific finding that cable modem service is an interstate service. As such, broadband Internet access service should not be subject to state regulation. The FCC should assert Title I jurisdiction over all broadband Internet access services. The FCC may assert Title I jurisdiction over broadband Internet access service pursuant to the Congressional mandate found in Section 706 of the Telecommunications Act of 1996 that directs the FCC to encourage the timely deployment of "advanced telecommunications capability to all

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in the *Incumbent LEC Broadband* rulemaking proceeding on March 1, 2002, which are incorporated herein by reference.

<sup>9</sup> In remarks at The 21<sup>st</sup> Century High Tech Forum on June 13, 2002, United States President George W. Bush commented on "the economic vitality that will occur when broadband is more fully accessible." The President also stressed the importance of increased broadband investment to the Nation and of policies that "eliminate hurdles and barriers to get[ting] broadband implemented."

<sup>10</sup> Qualified only by comments herein concerning: 1) the need to permit certain telecommunications carriers to file broadband tariffs and to permit continued participation by them in the NECA pools for broadband; and 2) the need for all broadband providers to contribute to universal service support mechanism on a competitively neutral basis.

Americans”<sup>11</sup> by removing barriers to infrastructure investment. Any regulations applied to broadband Internet access service by the FCC should be applied equally to all broadband Internet access services, regardless of the platform used to deliver the service.

The FCC should encourage broadband Internet access service providers to offer open access to their broadband platforms to unaffiliated Internet service providers but should not mandate open access. Broadband providers that provide stand-alone broadband transmission to unaffiliated Internet service providers are engaged in the provision of private carrier service, not common carrier service.

Broadband Internet access service, an interstate information service, utilizes a transmission component that is telecommunications. The obligation to fund universal service support mechanisms should be broadened to include all broadband providers, whether they provide telecommunications or telecommunications services, and all broadband providers should be assessed for their universal service contribution in a similar manner.

In order to ensure effective advanced services deployment and reasonable pricing, carriers eligible for participation in NECA pools should be allowed to elect Title II regulation for their broadband services. Further, they should be permitted to participate in the applicable NECA pool(s) and interstate tariffs or file individual company broadband service tariffs.

## **DISCUSSION**

### **Cable Modem Service is an Interstate Information Service**

In its *Declaratory Ruling*, the FCC determined that cable modem service is an interstate Information service. In its *Wireline Broadband NPRM*, the FCC tentatively concluded that “wireline broadband Internet access service provided over a provider’s own facilities is an

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<sup>11</sup> 47 U.S.C. § 706(a).

information service. USTA believes that the FCC is correct in its conclusion in both instances. As to both wireline broadband Internet access service and cable modem service, the FCC's analysis and conclusion in classifying cable modem service as an information service is a reasonable reading of the relevant portions of the Communications Act. A critically important point, though, is that however the classification question is ultimately answered, all broadband service providers must operate under the same regulatory rules in order to avoid giving any one broadband platform or broadband service provider an advantage over another in the competitive marketplace.

The only exception to this regulatory parity principle is that telecommunications carriers wishing to continue under Title II regulation for their broadband services, by participating in the NECA pools or filing individual company tariffs, should be able to do so. Certain rural and high cost areas present unique circumstances that require taking a different approach to providing for the reasonable and timely deployment of broadband facilities. In such cases, the complete deregulation of broadband may discourage rather than encourage broadband investment and that outcome should be avoided.

#### The FCC Should Not Mandate Open Access

The FCC should not require that cable modem service providers provide open access. USTA believes that open access should be encouraged but not mandated. The market for broadband access to the Internet is competitive. Absent a clear demonstration that ISPs are unable to reach commercial arrangements with broadband transmission providers, the FCC should not require any broadband provider to provide open access.

A customer's ability to select an ISP of his or her choosing is a competitive issue in a broadband market that has no dominant service provider. Customers will decide how important it is to have a choice of ISP, and customers for whom it is important will patronize broadband service providers that offer them that choice. It is not necessary, though, for the FCC to mandate open access for cable modem service providers or wireline broadband Internet access service providers.

#### The FCC Should Assert Title I Jurisdiction

To the extent that the FCC asserts its Title I regulatory jurisdiction with respect to wireline broadband Internet access service providers, it should likewise assert its Title I regulatory jurisdiction with respect to cable modem service providers. To do otherwise, would be arbitrary, discriminatory and contrary to the public interest.

As mentioned below, the FCC must ensure that there continues to be sufficient support provided for universal service. Broadband service providers should share in the obligation to support universal service. The FCC can ensure that cable modem service providers support universal service in a fair and equitable way by first finding, pursuant to Section 254(d), that the public interest requires such support based on their provision of interstate telecommunications as an integrated element of their interstate information service. Having made such a finding, the FCC can then assert its Title I ancillary jurisdiction to compel cable modem service providers to make an appropriate contribution to the support of universal service.

## Wireline Broadband Internet Access Service and Cable Modem Service Should Receive the Same Regulatory Treatment

ILECs do not have market power in the broadband market, and ILECs are non-dominant providers of broadband service. Accordingly, the FCC cannot lawfully continue to impose regulatory obligations upon ILEC broadband providers while imposing *de minimis*, if any, regulatory obligations on cable providers or other broadband providers. By imposing regulatory burdens on ILEC broadband providers that are not imposed on other broadband providers, the FCC stifles broadband investment and innovation by ILECs and limits customer choice. From a customer perspective, there is no demonstrated reason for treating the respective non-dominant providers of broad differently. The continued imposition by the FCC of disparate regulatory burdens that disadvantage ILECs in the competitive broadband marketplace is punitive and unjustified.

## Section 706 Provides the FCC with Statutory Authority to Act

Section 706 of the Communications Act of 1996 imposes upon the FCC the obligation to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”<sup>12</sup> Advanced telecommunications capability includes broadband capability. The authority conferred by the Congress upon the FCC for the purpose of encouraging the reasonable and timely deployment of broadband and other advanced

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<sup>12</sup> 47 U.S.C. § 706(a).

telecommunications capabilities provides the FCC with the ability to take such actions as are necessary in order to increase broadband investment and to forbear from imposing regulations that discourage the deployment of broadband facilities. Section 706 provides the FCC with the ability to create a regulatory environment that is minimalist in its requirements, does not discriminate among broadband providers and enhances customer choice for broadband.

#### The Constitution Requires Equal Treatment For Similarly Situated Broadband Services

While USTA believes that open access should be encouraged but not mandated, USTA does not believe that an open access requirement applied to cable modem Internet access service is prohibited by the First Amendment to the U.S. Constitution. Common carriers have historically operated with nondiscrimination obligations. Such nondiscrimination obligations in the common carrier context are analogous to an open access obligation for cable modem service providers. While it would be bad policy for the FCC to impose open access obligations on cable modem service providers, it would not be unconstitutional.

Further, USTA does not believe that open access gives rise to a Fifth Amendment takings claim. An open access requirement does not deprive a cable modem service provider of the use of its property. An open access requirement, while not required in order to protect the public interest, imposes a limited burden on a cable modem service provider's property that is within constitutional limits.

The more compelling question is whether the constitutional rights of wireline broadband Internet access service providers are abridged when regulatory burdens are placed upon them that are not applied to their similarly situated competitors and those regulatory burdens place them at a material disadvantage in the competitive marketplace. The FCC can alleviate this



concern by removing existing regulatory burdens that are imposed on wireline broadband Internet access service providers and place such broadband providers on an equal regulatory footing with nonwireline broadband providers.

Stand Alone Broadband Transmission to an Unaffiliated ISP is a Private Carrier Service

USTA believes that one can distinguish the wholesale provision of broadband transport to an unaffiliated ISP, where the ISP bundles the broadband transport with its Internet access service for the purpose of offering its own integrated retail service, from the retail sale of broadband transport to the mass market. Given the exceedingly narrow scope of the class to which the transport is to be provided, USTA believes that there is not an offering of service to the public in the traditional sense and the arrangement is more closely related to private carriage.

If Applied to the Broadband Internet Access Service of any ILEC, Computer II and III Should be Equally Applied to Cable Modem Service

*Computer II and Computer III* requirements should not be imposed on any broadband providers. Nonetheless, should the FCC continue to apply Computer II and Computer III requirements on ILECs providers of broadband, the requirements should be equally applicable to cable modem service providers. The public interest does not require the application of *Computer II or Computer III* type requirements on any providers of broadband Internet access services.

Equivalent Title II Forbearance is Required

Should the FCC or a court determine that the provision of cable modem service is a telecommunications service, the fundamental need for regulatory parity among all providers of

broadband service remains unchanged. If cable modem service is deemed to be a telecommunications service and the FCC proceeds to forbear from imposing Title II regulation on cable modem service providers, then the FCC must also forbear from imposing Title II regulation upon wireline broadband Internet access service providers.

#### Broadband Internet Access Service is Interstate and Should Not be Subject to State Regulation

It is imperative that the industry make broadband investment decisions on the basis of a national broadband policy that encourages investment and competition and not multiple, and possibly inconsistent, state broadband policies. USTA agrees with the FCC's finding that Internet access service is interstate in nature and this conclusion is unaffected by the particular broadband platform over which the Internet access service is provided. Providing states with the opportunity to assert jurisdiction over broadband will invite increased regulation and costs for broadband providers. Such a result would discourage broadband investment. The FCC has sufficient grounds upon which to retain exclusive jurisdiction over Internet-bound traffic, and it should do so. To the extent that state and local governments have a legitimate public health, safety and welfare interest in managing state and local rights-of-way, the FCC must restrict the ability of states and local governments from imposing unreasonable and unnecessary restrictions and costs upon broadband service providers that seek to deploy broadband facilities.

#### Cable Modem Service Providers Should Support Universal Service

It is absolutely essential that the FCC not allow for the undermining of the universal service program as a result of moving forward with reforming the regulatory construct for broadband service providers. Implementing policies that encourage investment in broadband and

place all broadband providers on an equal regulatory footing does not conflict with the preservation of universal service and sufficient universal service support mechanisms. Certainly, there are parts of the Nation that would be without affordable telephone service if the universal service high cost support mechanism was to lose substantial funding as a result of the regulatory classifications applied to broadband service providers. The FCC can proceed with its classification of cable modem service and wireline broadband Internet access service as information services and still preserve a secure funding base for universal service-supported programs.

The classification of these services as information services requires the acknowledgment that telecommunications is an integral element in the provision of broadband Internet access service by cable companies and wireline carriers. Section 254 provides the FCC with the discretion to require providers of interstate telecommunications to contribute to universal service support mechanisms should the FCC find that doing so serves the public interest. USTA believes that the public interest requires such a finding. The preservation of universal service and pursuit of the mandate contained in Section 706 are not mutually exclusive. The Nation's interest is best served through the preservation of universal service and the reasonable and timely deployment of advanced telecommunications capability to all Americans.

## **CONCLUSION**

The broadband market is competitive and the FCC has determined that there is no dominant provider of broadband service. Broadband providers should have the flexibility to offer services that meet consumers' demands. Regulatory requirements should not influence consumers' choices among competitive broadband service providers. Therefore, the FCC should

take actions that are deregulatory in nature and place all broadband providers in an equal regulatory position. In order to accomplish this, the FCC must coordinate its actions in this proceeding with the actions that it takes in related proceedings affecting the provision of broadband over wireline facilities.

The FCC should expand the base of universal service support to include all broadband providers, including cable modem service providers. Further, the FCC should ensure the timely deployment of broadband in all areas of the Nation by allowing NECA pool-eligible broadband services providers to elect continued Title II regulation for their broadband services - including the right to keep their broadband services in the NECA pool(s) and file broadband service tariffs.

Respectfully submitted,

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